

FEDERAL CIRCUIT COURT OF AUSTRALIA

*NGUYEN v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 2769

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugees Division) – Partner (Residence) (Class BS) (Subclass 801) visa – whether the Tribunal complied with its statutory obligations under s.360 of the *Migration Act* – whether the Tribunal logically and rationally made adverse credit findings – no jurisdictional error identified – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359A, 360, 476.

Migration Regulations 1994, reg.1.15A, cl.801.221 Schedule 2.

Applicant:	VAN AN NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1620 of 2016
Judgment of:	Judge Street
Hearing date:	27 October 2016
Date of Last Submission:	27 October 2016
Delivered at:	Sydney
Delivered on:	27 October 2016

REPRESENTATION

Counsel for the Applicant:	Mr B Zipser
Solicitors for the Applicant:	Andy Pham Lawyers
Solicitors for the Respondents:	Ms A Wong Mills Oakley Lawyers

ORDERS

- (1) The amended application is dismissed.
- (2) The Applicant pay the First Respondent's costs fixed in the amount of \$5,200.00.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1620 of 2016

VAN AN NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) ("**the Act**") in respect of a decision of the Administrative Appeals Tribunal ("**the Tribunal**") made on 31 May 2016 affirming a decision of the delegate not to grant the applicant a Partner (Residence) (Class BS) (Subclass 801) visa. The applicant is a citizen of Vietnam and the sponsor is an Australian citizen.

The Delegate's Decision

2. On 19 February 2015 the delegate declined to grant the applicant a Partner (Residence) (Class BS) (Subclass 801) visa and found that the applicant did not meet the criteria for the grant of that visa under clause 801.221 of Schedule 2 to the *Migration Regulations 1994* (“the Regulations”).
3. The delegate referred to the requirements of s.5F of the Act and also the mandatory considerations under reg.1.15A of the Regulations. The delegate found that in relation to the financial aspects of the relationship, the evidence provided did not demonstrate that the applicant and the sponsor support each other financially or that they are pooling their financial resources as claimed.
4. In relation to the nature of the household, the delegate was not satisfied that the information provided is reliable in establishing that the applicant and the sponsor are living together and have established a joint household.
5. In relation to social aspects, the delegate noted that the applicant and the sponsor continue to travel separately overseas.
6. In relation to the nature and commitment of the relationship, the delegate found that the information does not support any further development in establishing stated future plans or claimed long-term commitment by the applicant to the sponsor. The delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor.

The Tribunal's Decision

7. The applicant applied on 3 March 2015 for review of the decision made by the delegate. By letter dated 25 February 2016, the applicant was invited to attend a hearing on 20 April 2016. The applicant attended the hearing on that date to give evidence and present arguments and was represented by his migration agent.
8. Following the hearing, on 29 April 2016 the Tribunal sent the applicant a s.359A of the Act letter drawing attention to information and providing what might be the reason for the Tribunal affirming a

decision of the delegate. The Tribunal gave clear particulars of that information and how such information may impact on the Tribunal coming to a finding that the applicant and sponsor were not in a spousal relationship. The applicant was provided with an opportunity to respond.

9. The applicant's response was sent on 13 May 2016 and those email responses were referred to in paragraph 20 of the Tribunal's reasons. The Tribunal identified the applicant's claims and evidence and correctly identified the relevant requirements under clause 801.221(2)(c) of Schedule 2 to the Regulations and the requirements of s.5F of the Act and reg.1.15A of the Regulations.
10. The Tribunal found that the applicant's responses did not present the applicant as a credible witness. At the hearing, the Tribunal identified that there is other information that undermines the applicant's claims and gave an example by reference to the fact that the applicant and sponsor travel overseas separately and have not travelled overseas together.
11. A further reference was made by the Tribunal to the applicant's lack of knowledge about the sponsor's financial affairs and that the applicant appeared oblivious to the fact that his wife had recently purchased his property. That was a reference to the applicant's evidence, that the applicant had purchased an investment property about one year ago. The applicant on the other hand, gave evidence to the Tribunal that the sponsor owned an investment property for many years in the Blue Mountains. The Tribunal found that on a close analysis of the evidence there was little objective evidence that the parties share any intermingling of their financial affairs.
12. The Tribunal made reference to the sponsor using the sponsor's parents address for the sponsor's passenger movement cards. The Tribunal found that although referring to the applicant's explanation, it demonstrates that the sponsor is an unreliable witness about her circumstances.
13. The Tribunal was not prepared to accept the evidence of the applicant and sponsor as to the actual living arrangements for the sharing of household work. The Tribunal was not prepared to accept either the

applicant or the sponsor as a credible witness when it came to the nature of their relationship.

14. The Tribunal expressed grave concerns about the credibility of the nature of the relationship. The Tribunal made reference to the combination of the lack of overseas travel together and the applicant's ignorance of the major financial decisions made by the sponsor as leading the Tribunal to find that the parties did not know much about each other.
15. The Tribunal was not prepared to accept the sponsor and applicant's evidence that they see their relationship as long-term. The Tribunal did not accept that the applicant and the sponsor had a mutual commitment to a shared life to the exclusion of others or, that they have a genuine and continuing relationship.
16. The Tribunal was not satisfied that at the time of the decision the parties were in a spousal relationship. The Tribunal found that the applicant did not meet clause 801.221(2)(c) of Schedule 2 to the Regulations. The Tribunal noted there was no evidence before the Tribunal that the applicant met the alternative criteria and accordingly, affirmed the decision of the delegate.

Proceedings Before this Court

17. The grounds of the amended application are as follows:-

1. The Administrative Appeals Tribunal ("the Tribunal") found that "the combination of lack of overseas travel and Mr Nguyen's ignorance of major financial decisions made by Ms Nguyen lead the tribunal to find that the parties do not know much about each other." This finding was critical to the Tribunal's ultimate decision. The Tribunal fell into jurisdictional error in making this finding for reasons including the following:

a) The fact that the parties had travelled overseas independently of each other on a few occasions had no logical or rational connection to the Tribunal's assertion that "the parties do not know much about each other".

b) The Tribunal found (at [31]) that Mr Nguyen was ignorant of one major financial decision made by Ms Nguyen being that "a few years after their marriage Ms Nguyen had sold and purchaser

a property.” There was no basis for the Tribunal to assert that Mr Nguyen had “ignorance of major financial decisions” when there was only one major financial decision of which he was ignorant.

c) There was an abundance of evidence before the Tribunal which indicated that the parties knew a lot about each other. The Tribunal ignored this evidence in finding that “the parties do not know much about each other.” The Tribunal’s finding that “the parties do not know much about each other” had no evidentiary support, or was illogical in light of the evidence before the Tribunal.

d) In the circumstances, the Tribunal ought to have raised with the applicant its concern that the parties did not know much about each other and given the parties an opportunity to respond. The Tribunal’s failure to do so involved a denial of procedural fairness and breach of s 360 of the Migration Act.

2. The Tribunal found that it was “not prepared to accept [the parties’] evidence the actual living arrangements for the sharing of the housework”. [sic] This finding was critical to the Tribunal’s ultimate decision. In circumstances where:

a) the Tribunal found that the parties live together (at [34]), socialise together (at [35]), and have relatives and friends who attest to the relationship (at [351]):

b) the Tribunal did not reject the parties’ claim that they “pool their financial resources [and] share day-to-day household expenses” (at [32]):

c) there was no specific evidence which suggested that their claims concerning the sharing of housework (at [12] and [17]) was not true; and

d) the housework (grocery shopping, cooking, cleaning etc) was done or had to have been done by one or both of them,

the Tribunal’s rejection of the parties’ evidence concerning sharing of housework was arbitrary, giving rise to Jurisdictional error. For the Tribunal to have avoided making an arbitrary decision, it should have provided a rational basis for rejecting the parties’ evidence concerning sharing of housework or made a positive finding as to how the housework was done in a manner which did not involve “sharing”. Alternatively, the Tribunal should have raised with the applicant its concern that the parties did not share the housework, and given the parties an opportunity

to respond. The Tribunal's failure to do so involved a denial of procedural fairness and breach of s 360 of the Migration Act.

3. The Tribunal found (correctly) that “both parties have travelled overseas on a number of occasions and on no occasion have they travelled together”: at [27] (“the Overseas Travel Fact”). The Overseas Travel Fact was one of two findings of primary facts critical to the Tribunal's decision. The Tribunal then found the Overseas Travel Fact “implausible” (at [28]), “inconsistent with their claims of jointly undertaking social activities together” (at [28]), evidence “that the parties do not know much about each other” (at [36]), and founded conclusions that the parties were not “credible witnesses when it comes to the nature of their relationship” and “the nature of their relationship was not credible” (at [36]). The weight the Tribunal placed on the Overseas Travel Fact, and the manner in which the Tribunal relied on the finding was such that the Tribunal fell into jurisdictional error.

4. The Tribunal found that “Mr Nguyen had no knowledge that a few years after their marriage Ms Nguyen had sold and purchased a property” (“the Property Purchase Ignorance Fact”). The Property Purchase Ignorance Fact was the other of two findings of primary fact critical to the Tribunal's decision. Based on the Property Purchase Ignorance Fact, the Tribunal then found that “Mr Nguyen displayed a lack of knowledge about Mrs Nguyen’s financial affairs” (at [27]). The Tribunal repeated this finding at [29] and [36]. The fact that Mr Nguyen was unaware of one transaction does not support a conclusion or provide a basis for finding that he was unaware of more than one transaction. The Tribunal's latter findings were illogical or not supported by evidence, which is a jurisdictional error.

5. The Tribunal found that it was “not prepared to accept either party as being a credible witness when it comes to the nature of their relationship” because the Tribunal “has grave concerns about the credibility of the nature of the relationship”: at [36]. The Tribunal fell into jurisdictional error in making these findings.

18. In relation to Ground 1, Mr Zipser of Counsel sought to focus on the conclusion drawn by the Tribunal that the parties did not know much about each other. Mr Zipser of Counsel contended that whilst the evidence may have supported a finding as to the lack of understanding of a financial transaction by the applicant of the sponsor in the recent

acquisition of a property, there is no expressed reference to what the parties knew about each other.

19. The finding made by the Tribunal was a finding drawn from the other findings made by the Tribunal. The adverse finding made by the Tribunal in relation to the parties not knowing much about each other was open and it cannot be said to lack an evident and intelligible justification.
20. This is a case where the Tribunal complied with its statutory obligations in relation to inviting parties to attend the hearing. On the material before the Court, including the transcript, the applicants had a genuine and meaningful hearing. It was patent that this was a live issue as to whether the applicant and the sponsor met the requirements of s.5F of the Act and reg.1.15A of the Regulations, as a result of the adverse findings of the delegate. The Tribunal complied with its obligations under s.360 of the Act. No jurisdictional error is made out by Ground 1.
21. In relation to Ground 2, the Tribunal gave reasons in support of the adverse credibility findings that cannot be said to lack an evident and intelligible justification. It was open to the Tribunal to reject the applicant's evidence in relation to the actual living arrangements for the sharing of housework. That was a finding of fact. Ground 2 is in substance, an impermissible challenge to the adverse findings of fact made by the Tribunal. No jurisdictional error of the kind alleged in Ground 2 is made out.
22. Further, there was no breach of s.360 of the Act in relation to the adverse findings made by the Tribunal which rejected the applicant and sponsor's evidence about the living arrangements for the sharing of housework. It was apparent from the delegate's decision that the criteria for the grant of a visa was a live issue.
23. It is apparent from the transcript that the issue of shared housework was raised with the applicant. There was an obvious inconsistency between what the applicant said as to the applicant mainly doing certain things, in contrast with what had been earlier contended. The Court was taken to, being the statutory declaration of the applicant and the sponsor, as well as that of a friend. In relation to Ground 2, a denial

of procedural fairness is not made out. Nor is a breach of s.360 of the Act made out.

24. In relation to Ground 3, the finding by the Tribunal that the applicant and sponsor had not travelled overseas together was an obvious logical and rational foundation to support the adverse findings made by the Tribunal. Ground 3 is in substance, an impermissible challenge to the adverse findings of fact made by the Tribunal. No jurisdictional error is made out by Ground 3.
25. In relation to Ground 4, this again is in substance, an impermissible challenge to the adverse findings of fact that were made by the Tribunal. The absence of knowledge about the financial transactions involved in the sponsor acquiring an investment property about a year ago was an obvious matter and a logical and rational basis for the Tribunal to make the adverse findings made. No jurisdictional error is made out by Ground 4.
26. In relation to Ground 5, the determination of credit is a matter par excellence for the Tribunal. This is not a case where the adverse findings of credit were made on some general passing comment or general impression. Rational and logical reasons were given for the adverse credit findings that were open on the material before the Tribunal.
27. Insofar as Ground 5 is sought to be advanced on the basis that the Tribunal failed to properly apply the correct criteria in determining whether there was a genuine and continuing relationship, the Tribunal correctly identified the relevant law. There is no proper basis to hold that the Tribunal failed to apply the correct criteria. In substance, the submission advanced on this ground is an impermissible challenge to the adverse finding of fact made by the Tribunal that was open. Ground 5 fails to make out any jurisdictional error.
28. The amended application is dismissed.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 21 November 2016